APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED APRIL 21, 1999 AND AMENDED JUNE 3, 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANDY SNYDER, ADMINISTRATOR OF THE ESTATE OF DAVID HAAS,
Plaintiff,

and

BILL BROOKE; ROBERT SANDOVAL; and ROBERT WILLIAMS,
Plaintiffs-Appellants-Cross-Appellees,

v.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287; ED QUINTAL; ED DE BROCK; GEORGE NETTO; and LEE SCOGGINS,
Defendants-Appellees-Cross-Appellants.

Nos. 96-15267
96-15274

D.C. No.
CV-89-20531-WAI

ORDER AND
AMENDED
OPINION

Appeals from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Argued and Submitted
July 13, 1998—San Francisco, California

Filed April 21, 1999
Amended June 3, 1999

Before: Stephen Reinhardt, John T. Noonan, and David R. Thompson, Circuit Judges.

Opinion by Judge Reinhardt

Appendix A

SUMMARY

Labor and Employment/Unions

The court of appeals affirmed an order of the district court in part and reversed in part. The court held that under the Labor Management Reporting and Disclosure Act (LMRDA), members of a union's executive board may use union funds to retain counsel and institute an action against a union official who has violated his statutory fiduciary duties.

Prior to the 1988 elections, appellants Bill Brooke, Robert Sandoval, and Robert Williams were members of the Executive Board of appellee Freight, Construction, General Drivers, Warehousemen and Helpers, Local No. 287. During 1988, these Board members came to believe that Mario Gullo, the local's chief executive officer and secretary-treasurer, was mishandling union funds for his own benefit. Because of an absence of accounting records, they were particularly concerned about supplemental dues and the Sick and Death Benefit Fund.

In 1987, the union had increased the share of monthly dues payments allocated to the Sick and Death Benefit Fund. However, there was no corresponding increase in the Fund's value. When the Executive Board members confronted Gullo about the discrepancy, they did not receive an explanation that satisfied them. They consulted with attorney Fernando Hernandez and passed a motion authorizing the union to retain him to conduct an investigation.

When Gullo continued to refuse to provide information regarding financial matters to the Executive Board, Hernandez filed an action against him on behalf of the individual Board members and the union. The complaint alleged that Gullo failed to provide an accounting of funds in his possession in violation of the union's bylaws, and had diverted

union funds to his own use. (The cited bylaws gave the Board authority to retain attorneys to institute legal proceedings if it determined that such action was necessary to "protect, preserve, or advance the interests of the organization.") The plaintiffs requested an accounting and damages equal to the amount of the misappropriated funds. A short time later, Gullo purportedly "found" $11,748 in his safe and presented Sandoval with a check in that amount.

In the 1988 elections, David Haas defeated Gullo in the campaign for secretary-treasurer, the union's top post. However, Gullo's supporters were elected to a majority of the positions on the Executive Board. The new Board fired Hernandez. Gullo filed internal charges against Brooke and the other plaintiffs, alleging that the lawsuit and related expenditure of union funds were politically motivated and intended to harm Gullo, and defrauded the union of $13,000. Pursuant to his authority as secretary-treasurer, Haas cancelled the scheduled hearing on the charges, and none of the plaintiffs attended.

A panel of the Local consisting of the Gullo supporters on the Executive Board and others chosen by them conducted a trial at the scheduled time. The result was that each plaintiff was removed from office, fined, and ordered to reimburse the union for costs incurred by Hernandez. Based primarily on the record of the trial, the Teamsters Joint Council upheld the action except as to Haas, but reduced the amount of the fines.

Brooke and the other plaintiffs filed another action, contending that the assessment of fines against them and their removal from office constituted discipline in violation of the LMRDA; that the discipline was invalid because it was imposed in retaliation for the plaintiffs' filing of a legitimate lawsuit, in violation of § 101(a)(2) and (4) of the statute; and that the hearings violated the plaintiffs' right to due process in union disciplinary proceedings in violation of § 101(a)(5).

Appendix A

The district court granted summary judgment for the plaintiffs as to liability on the § 101(a)(5) claim, ruling that the original hearing denied the plaintiffs the process they were due under the LMRDA, and that the Joint Council proceedings failed to cure the procedural defects. The court also determined that the first trial was biased in that the plaintiffs' political opponents actively participated in it, and that the second trial before the Joint Council was biased as a matter of law due to the Council's reliance on the records of the first proceeding. The case proceeded to trial on all other issues.

The district court and the parties characterized the action as a "mixed motives" case; the court instructed the jury accordingly. The jury returned a verdict in the plaintiffs' favor, awarding substantial compensatory and punitive damages. However, the court granted a defense motion for a new trial as to Brooke, Sandoval, and Williams on the § 101(a)(5) claims, based on its understanding that liability was to be assessed according to a mixed-motives regime, and that the defendants had established the affirmative defense that the plaintiffs would have been disciplined in any event for violating a reasonable union rule.

In the second trial, the district court again instructed the jury as if the case were a mixed-motives action. This time, the jury returned a verdict for the defendants on the free speech and right-to-sue claims. As to damages for the procedural due process violation, the jury awarded each plaintiff five dollars.

On appeal, the plaintiffs contended that the district court erred in granting the defendants a new trial. The defendants cross-appealed, asserting that the district court erred in granting summary judgment for the plaintiffs on their due-process claim, and that the damages were excessive.

[1] The parties and the district court confused the issue by characterizing the litigation as a mixed-motives case. The order setting aside the verdict and directing a new trial was

based on the court's understanding that the union had made out an affirmative defense available under a mixed-motives approach. A mixed-motives case calls on the court to determine what motive or motives led the defendant to take a disputed disciplinary action.

[2] This case did not present a dispute as to what motivated the defendants to discipline the plaintiffs. The parties agreed that the defendants disciplined the plaintiffs because the plaintiffs caused the Executive Board to retain Hernandez to institute the action against Gullo, and to obligate union funds in the process. If that conduct was protected by the LMRDA, the defendants' motives were irrelevant, at least as to liability. The dispositive point was that the conduct for which the plaintiffs were disciplined *was* lawful, and could *not* constitute the basis for discipline under the LMRDA. The court was therefore not called on to determine what motivated the defendants to act. The district court's new trial order was based on an erroneous legal theory.

[3] The question presented by this case was whether there was a legitimate basis for the *plaintiffs*' actions: whether there was a legitimate reason for the three members of the Executive Board to cause the union to hire Hernandez and to have him file the action against Gullo, with the concomitant expenditure of union funds.

[4] Section 501(a) of the LMRDA describes the fiduciary responsibilities of officers of labor organizations. Officials such as Gullo occupy positions of trust, and must hold the union's money or property solely for the benefit of the organization and its members. Implicit in the grant to union members of the right to sue, when the governing board of the union fails to do so, is an obligation on the part of the executive board to bring an action or seek appropriate relief on behalf of the union against an officer when the board becomes aware that the officer has violated his § 501(a) duties. In bringing such an action, the board may use union funds.

[5] The plaintiffs had valid cause to believe that Gullo was mishandling union funds. [6] The evidence supported the determination that at the time the plaintiffs hired Hernandez and caused the action to be brought against Gullo, they had valid cause to believe that Gullo was violating his § 501(a) duty to hold the union's money solely for the benefit of the organization. The plaintiffs' actions were therefore appropriate and consistent with their legal obligations, and a jury finding to that effect was not subject to reversal by the district court. [7] This conclusion was confirmed by the union's bylaws.

[8] An action instituted to ensure that the union's secretary-treasurer is properly handling union funds is one designed to protect the interests of the union. [9] It was irrelevant that the plaintiffs referred to the lawsuit against Gullo in the subsequent election campaign, or that they may have benefited politically from it. It was also irrelevant that the plaintiffs may have been motivated by political considerations when they brought the action. When an action is brought to recover unlawfully expended union funds, or to obtain a statutorily required accounting, a reasonable basis for the action is sufficient to preclude discipline.

[10] Under the instructions given by the district court, in order to find for the plaintiffs the jury was required to determine that they were engaged in protected conduct, i.e., that they hired Hernandez and instituted the action against Gullo in order to safeguard union assets. On the other hand, the jury was to find for the defendants if it determined that the plaintiffs used union funds to hire Hernandez and pursue the action in support of their candidacy for union office. In returning a verdict in favor of the plaintiffs, the jury necessarily concluded that the hiring of Hernandez and the institution of the action were undertaken in the interests of the union, and not in support of the plaintiffs' candidacy. [11] The plaintiffs were therefore entitled to reinstatement of the original verdict.

[12] When an award of damages is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork, and gives rise to an inference that passion and prejudice tainted the jury's finding of liability, a new trial may be in order. However, when there is no evidence that passion and prejudice affected the liability finding, remittitur is an appropriate method of reducing an excessive verdict. There was no evidence that the liability determination was tainted by passion or prejudice. On remand, the district court could consider a remittitur on damages, but could not order a new trial.

[13] A trial de novo is required to remedy a union disciplinary hearing that does not meet the due-process standards of § 101(a)(5). A mere review of the evidence or results of the previous hearing is not sufficient to constitute such a trial. The evidence presented to the Joint Council consisted almost entirely of the transcript of the first hearing (conducted by the biased Local 287 panel). The second hearing did not constitute a trial de novo, and failed to cure the procedural defects of the first. The district court's summary judgment as to the plaintiffs' § 101(a)(5) claim therefore had to be affirmed.

COUNSEL

Christopher W. Katzenbach, Katzenbach and Khtikian, San Francisco California, for the plaintiffs-appellants-cross-appellees.

Kenneth C. Absalom, Beeson, Tayer & Bodine, San Francisco, California, for the defendants-appellees-cross-appellants.

ORDER

The opinion filed April 21, 1999 is amended as follows:

Appendix A

At Slip Op. 3689, following the last sentence of the runover paragraph, the following is added:

> Interest on the damages ultimately awarded by the district court shall be paid from the date of the original judgment, October 18, 1994. *See, e.g., American Telephone & Telegraph Co. v. United Computer Systems, Inc.*, 98 F.3d 1206, 1209 (9th Cir. 1996)(*citing Northrup Corp. v. Triad Int'l Marketing, S.A.*, 842 F.2d 1154, 1156 (9th Cir. 1988)). That judgment was legally sufficient to allow adequate "ascertainment of the damage[s]," subject, of course, to the remittitur ordered herein. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

OPINION

REINHARDT, Circuit Judge:

This case arises out of a bitter internal dispute involving charges of misuse of union funds. The struggle, which occurred twelve years ago, also involved a fight for control of leadership of the local union. At one point, shortly preceding a local union election, the plaintiffs took their charges of financial misconduct to federal court but were quickly disciplined by the union for using union funds to do so. The plaintiffs then filed the present action in the district court under §§ 101(a)(2), (a)(4), and (a)(5) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 411(a)(2)-(5). They asserted a violation of their free speech rights, their rights to sue, and their right to a fair union hearing, and sought damages on account of the "unlawful" disciplinary action. The plaintiffs won a substantial judgment from a jury on all counts, but lost that victory when the district judge ordered a new trial. The plaintiffs had succeeded earlier in the proceeding, however, in establishing a violation of their pro-

cedural rights to a fair union trial under § 101(a)(5). Accordingly, as to that claim, the jury was required to determine only the amount of the damages and the district judge limited the new trial order on that count to damages only. The plaintiffs appeal the new trial order in its entirety, while the defendants cross-appeal the earlier ruling of liability on the procedural claim. We uphold plaintiffs' appeal and reinstate the jury verdict; we also reject the defendant's cross-appeal.

I.

Background

Prior to the 1988 union elections, plaintiffs Bill Brooke, Robert Sandoval and Robert Williams were members of the Executive Board of Teamsters Local 287. Brooke was also vice-president, Sandoval was president, and Williams was a Trustee. During 1988, the plaintiffs and Dave Haas[1] came to believe that Mario Gullo, the local's chief executive officer, its secretary-treasurer, was mishandling several of his financial responsibilities. In particular, due to the apparent absence of records that reflected the actual receipt and expenditure of "supplemental dues," the plaintiffs were concerned about how Gullo was handling that segment of the union's funds. For other reasons, they were also concerned about his handling of the Sick & Death Benefit Fund. Supplemental dues are paid by certain union members in addition to the standard dues that all members pay. The Sick & Death Benefit Fund, financed through regular dues, provides benefits to a union member who becomes disabled, or to the family of a member who dies.

In 1987, the union increased the share of the monthly dues payments allocated to the Sick and Death Benefit Fund. In early 1988, Sandoval became concerned that despite this

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[1]Haas, another member of the Executive Board and a business agent, was a plaintiff in the original action, but has since died.

increase, there was no corresponding increase in the Fund's total value. The plaintiffs approached Gullo about the discrepancy between the increased allotment for the fund and the Fund's actual growth, but did not receive what they felt to be a satisfactory explanation. This, combined with their frustration over their inability to determine the status of the monies paid as "supplemental dues," caused the plaintiffs to look for help outside the Teamsters union.

After first seeking assistance from the Department of Labor, the plaintiffs sought the advice of a private attorney, Fernando Hernandez, in September 1988. Following an initial meeting with Hernandez, the plaintiffs brought a motion before the local union Executive Board to hire Hernandez to conduct an investigation into the supplemental dues and "other related matters." The motion passed, and the plaintiffs signed a retainer agreement with Hernandez on behalf of the local union.

In November 1988, as a result of Gullo's continued refusal to provide information regarding financial matters to the Executive Board, Hernandez filed an action against him in United States District Court on behalf of the individual plaintiffs and the union. The complaint alleged that in September 1987 Sandoval had requested an accounting of funds in Gullo's possession and that the bylaws of Local 287 require the secretary-treasurer to provide such an accounting, but that Gullo had failed to furnish one. The complaint further alleged that Gullo had diverted union funds to his own personal use. The complaint requested, inter alia, a full accounting and damages equal to the amount of funds misappropriated by Gullo.[2]

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[2]In addition to filing the action, Hernandez performed several other functions. Hernandez secured for the Executive Board a copy of the racial discrimination settlement agreement reached between Gullo (on behalf of Local 287) and Syble Coleman. Hernandez also wrote to Fleming Foods to advise it that it was illegal to allow campaigning at the company by the Gullo slate and not by other candidates.

Shortly after the action was filed, Sandoval found a check on his bulletin board made out to the Sick and Death Benefit Fund in the amount of $11,748.28. Sandoval asked Gullo about the check, and Gullo responded that he had just recently "found" the money in his safe. As Sandoval testified:

> "I says: Mario, what's this? . . . This check for the Sick and Death Benefit. Where did it come from? And he says: Oh, we found it in the safe. We found that money in the safe. . . . I told him: You mean — how convenient. After all this time you find the money in the safe? . . . He says: That's all I could tell you."

In December 1988, the union held its election for officers and business agents. Haas defeated Gullo in the campaign for the top post, secretary-treasurer, but Gullo's supporters were elected to a majority of the positions on the Executive Board. Sandoval was re-elected as president, while Brooke and Williams won positions as business agents.

The new Executive Board discharged attorney Hernandez. Gullo then filed internal union charges against the plaintiffs and Haas relating to the hiring of Hernandez and the institution of the action. The charges asserted that the plaintiffs' actions were "politically motivated and intended to harm [Gullo] and defraud the local union funds or credit in the amount of $13,000 . . . ." A hearing on the charges was scheduled for August 16, 1989, but on August 15 the meeting was cancelled by Haas, pursuant to his authority as secretary-treasurer. As a result, none of the plaintiffs attended the hearing. A panel of the local union, consisting of the Gullo supporters on the Executive Board and three others chosen by them, held a hearing at the time scheduled, and tried and convicted the plaintiffs in absentia. Each plaintiff was removed from office, fined $5,000, and ordered to reimburse the union for costs incurred by attorney Hernandez. The plaintiffs appealed their convictions to Teamsters Joint Council 7,

which subsequently reversed Haas's conviction, but affirmed the convictions of all plaintiffs here, although it reduced the fines to $500 each.[3]

On August 22, 1989, the plaintiffs filed a complaint in the United States District Court alleging that the assessment of fines against them and their removal from office constituted discipline in violation of the Labor Management Reporting and Disclosure Act. The complaint further alleged that the discipline was invalid because it was imposed in retaliation for plaintiffs' filing a legitimate lawsuit, in violation of § 101(a)(2) and (4) of the LMRDA, and that the hearings violated the plaintiff's right to due process in union disciplinary proceedings, in violation of § 101(a)(5).[4] In 1993, the plaintiffs and defendants filed summary judgment motions. The district court (Aguilar, D.J.) granted the plaintiffs' motion as to liability on the 101(a)(5) claim, holding that the original local union hearing denied the plaintiffs the process they were due under the Act, and that the Joint Council proceedings failed to cure these procedural defects. The court found that the first trial was "clearly biased given that plaintiffs' political opponents actively participated," *Haas v. Local 287*, 832 F. Supp. 283, 287, (N.D. Cal. 1993), and that the second trial before the Joint Council was "biased as a matter of law" due to the Council's reliance on the records of the original proceeding. *Id.* The court denied all other summary judgment motions, and the case, including damages on the § 101(a)(5)

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[3]Contemporaneously, Gullo filed similar charges with the Teamsters Joint Council seeking to overturn the 1988 election. A rerun election was ordered by the Council and held in September 1989. This time, all the plaintiffs were defeated and Gullo once again became secretary-treasurer of the local union.

[4]Section 101(a)(2) of the LMRDA protects union members' right to free speech in internal union matters; 101(a)(4) protects union members' right to sue their union or its officers; 101(a)(5) provides that no union member may be subject to internal union discipline without certain procedural safeguards. *See* 29 U.S.C. § 411(a)(2)-(5).

claim, went to trial on August 16, 1994 before District Judge Ingram.

From the outset, the district court and both parties have characterized this action as a "mixed motives case." Accordingly, the district judge instructed the jury on how to assess liability in a mixed-motives case under the LMRDA. The jury returned a verdict in the plaintiffs' favor, and awarded compensatory and punitive damages.[5] Following the jury's verdict, however, the court granted the defendants' motion for a new trial as to plaintiffs Brooke, Sandoval, and Williams.[6] The court ordered the new trial on the § 101(a)(2) and (a)(4) claims based on its understanding that the defendants' liability

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[5]The jury awarded the following damages:

For plaintiff Brooke, the jury awarded $126,420 in lost wages, $14,450 for emotional distress, and $57,795 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against defendant Quintal, $3,000 in punitive damages against defendant Netto, $2,500 against Scoggins, and $3,000 against DeBrock.

For plaintiff Sandoval, the jury awarded $136,500 for lost wages, and $58,500 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against defendant Quintal, $4,000 against Netto, $2,500 against Scoggins and $3,500 against DeBrock.

For plaintiff Williams, the jury awarded $5,600 for lost wages, and $22,400 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against defendant Quintal, $3,000 against Netto, $2,500 against Scoggins, and $3,000 against DeBrock.

For Haas, the jury awarded $137,917 for lost wages, and $64,000 for injury to reputation on the §§ 101(a)(2) and (a)(4) claims, and $250,000 on the (a)(5) violation, as well as $50,000 in punitive damages against the union, $4,000 in punitive damages against Quintal, $3,500 against Netto, $3,000 against Scoggins, and $3,500 against DeBrock.

[6]Because Haas had not signed the contract with Hernandez, the District Court ordered only a remittitur in his case.

was to be assessed according to a mixed-motives regime, and that they had satisfied an affirmative defense available in mixed-motives cases.[7] In addition, the court ordered a new trial on damages on the plaintiffs' § 101(a)(5) claim, as to which liability had previously been established.

The second trial began on October 26, 1995. Again, it involved the plaintiffs' claims as to both liability and damages under §§ 101(a)(2) and (a)(4), and as to damages under (a)(5). The court again presented the jury with an LMRDA mixed-motives instruction identical in all relevant respects to that given during the first trial. This time, the jury returned a verdict for the defendants on the free speech and right to sue claims. As to the damages for the procedural due process violation, the jury awarded $5 to each plaintiff.

The plaintiffs appeal the district court's grant of a new trial following the original jury verdict, and the defendants cross-appeal the district court's grant of summary judgment on the plaintiffs' due process claim.

II.

The Appeal

[1] From the outset, both the parties and the district court have confused the issue by characterizing this litigation as presenting a "mixed motives" case. Indeed, the jury instructions were fashioned according to a mixed-motives liability regime. Most important for our purposes here, the district court's order setting aside the plaintiffs' verdict and directing a new trial was based on its understanding that the union had made out an affirmative defense available under a mixed-motives approach. As the district court wrote:

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[7]The court also ordered a new trial for the award of damages on the § 101(a)(5) violation, although it did not explain in its new trial order why the § 101(a)(5) damages awarded by the first jury were excessive or otherwise inappropriate.

> In this Court's view, the great weight of the evidence favors Defendants' affirmative defense that those plaintiffs would have been disciplined in any event for violating a reasonable rule of the Union even if the Defendants' disciplined them because of a retaliatory motivation.

The court derived this affirmative defense from *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977), the seminal Supreme Court case on mixed-motives liability. *Mt. Healthy,* and other true mixed-motives cases, however, involve the motives of the defendant. That is, a mixed-motives case calls on the court to determine what motive or motives led the defendant to take a disputed disciplinary action. When a defendant's motives are in dispute, a court resolves the case by determining whether the defendant "has shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy,* 429 U.S. at 287. If a defendant makes this showing, in a case where its motives are the issue, it satisfies an affirmative defense and is entitled to judgment.

[2] This case, however, does not present a dispute as to what motivated the defendants to discipline the plaintiffs. All parties agree that the defendants disciplined the plaintiffs because the plaintiffs caused the Executive Board to retain Fernando Hernandez, to institute the action against Mario Gullo, the union's secretary-treasurer, and to obligate union funds in the process.[8] If that conduct is protected by the LMRDA, as the plaintiffs urge, the defendants' motives are irrelevant, at least as to liability.[9] The dispositive point in this

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[8]That Hernandez performed several other tasks at the Board's request, such as procuring a copy of the Syble Coleman racial-discrimination settlement and informing Fleming Foods about the requirements of federal labor law, in no way alters our analysis.

[9]As we explain later, in this case the plaintiffs' motives, as well as the defendants', are irrelevant.

case is that the conduct for which the plaintiffs were disciplined *was* lawful and may *not* constitute the basis for discipline under the LMRDA. The court, therefore, is not called on, as it is in a mixed-motives case, to determine what motivated the defendants to act. Although the confusion is understandable, and to a large degree was invited by the parties, the district court's new trial order was based on an erroneous legal theory.

[3] The question presented by this case, in contrast to the question raised in a mixed motives case, is whether there was a legitimate basis for the *plaintiffs*' actions: that is, whether there was legitimate reason for the three plaintiffs, members of the union's Executive Board, to cause the union to hire Hernandez and to have him file the action against Gullo on the union's behalf, with the concomitant expenditure of union funds. Stated plainly, if the plaintiffs had legitimate grounds to cause the hiring of Hernandez and the institution of the action, then their conduct is protected and the discipline imposed on them was improper. If, on the other hand, the plaintiffs had no legitimate basis for their actions, the discipline imposed on them may have been lawful. This is because, unlike in the ordinary § 101(a)(4) case, the union is not purporting to discipline the plaintiffs simply because they, in their capacity as members, caused an action to be filed against the union or its officers — conduct that in itself is wholly immune from discipline under the LMRDA — but because as executive board members they caused union funds to be used for that purpose. The issue in the case before us, therefore, is whether the use of such funds was proper and lawful.[10]

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[10]Because, as we explain below, we conclude that there was a legitimate basis for the action against Gullo, we need not consider whether the plaintiffs could have been disciplined had they acted in good faith, but in fact no legitimate basis in fact existed for their actions. It would be odd, however, were the LMRDA to permit the discipline of any persons seeking to recover union funds that they in good faith believed to have been improperly converted by a union official.

[4] To determine whether the plaintiffs had a legitimate basis to cause the union to retain the attorney and file the action we turn first to the LMRDA.[11] Section 501(a) of the LMRDA describes the "fiduciary responsibility of officers of labor organizations." Union officials such as Secretary-Treasurer Gullo "occupy positions of trust," and must "hold [the union's] money or property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a). Equally important, § 501(b) dictates that:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States . . . .

29 U.S.C. § 501(b). Implicit in the grant to union members of the right to sue when the governing board of the union fails to do so, is an obligation on the part of the executive board of a union to bring an action (or seek appropriate relief in some other manner) on behalf of the union against an officer when the board becomes aware that the officer has violated

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[11]Because the defendants have not questioned the plaintiffs' ability to bring this action under § 101(a)(2) and (4), we do not address that question here. We note, however, that union officers, like union members are protected by the LMRDA against discipline that affects their rights as union members. *See, e.g. Grand Lodge of the Int'l Ass'n of Machinists v. King*, 335 F.2d 340, 343-44 (9th Cir. 1964). The Supreme Court has held specifically that a "fine" is a "punitive action taken against union members as members." *Finnegan v. Leu*, 456 U.S. 431, 437-38. As the plaintiffs here were fined by the union, they are protected against improper discipline by the LMRDA. *See id.*

his § 501(a) duties. Of course, in bringing such an action, the board may use union funds. Accordingly, if, at the time they acted, the plaintiffs, as executive board members, had valid cause to believe that Gullo was violating his § 501(a) fiduciary duties, then they had the right, if not the duty, under § 501(b) to act as they did, and the discipline imposed upon them was unlawful.

[5] The evidence makes clear that the plaintiffs had valid cause to believe that Gullo was mishandling union funds. As stated above, the record demonstrates that during 1988, the plaintiffs came to believe that Gullo was mishandling several sources of union income. In particular, the plaintiffs had reason for concern about how Gullo was handling supplemental dues and the Sick & Death Benefit Fund. There appeared to be no records regarding the former, and as to the latter, the records suggested serious delinquencies. Perhaps most relevantly, in 1987 the union increased the monthly payments made by each member to the Sick and Death Benefit Fund, and in early 1988 plaintiff Sandoval became aware that despite this increase, there was no corresponding increase in the Fund's total value.

As a result of Gullo's repeated refusals to provide information regarding these financial matters to the Executive Board, the plaintiffs caused the action to be filed against him, alleging that he had used union funds for his own personal use. Shortly after the action was filed, moreover, plaintiff Sandoval found the check on his bulletin board made out to the Sick and Death Benefit Fund in the amount of $11,748.28. When questioned, Gullo said that he had belatedly found the money in his safe.

[6] In short, the evidence strongly supports the determination that at the time the plaintiffs hired Hernandez and caused the action to be brought against Gullo there was valid cause to believe that Gullo was mishandling the union's funds. That is to say, at the time the plaintiffs acted, they had valid cause

to believe that Gullo was violating his § 501(a) duty to hold the union's money "solely for the benefit of the organization." Under § 501(b), therefore, the plaintiffs' actions were both appropriate and consistent with their legal obligations, and a jury finding to that effect would not have been subject to reversal by the district court.

[7] Our conclusion that the plaintiffs' use of union funds to retain Hernandez and institute the action against Gullo was proper is further confirmed by Local 287's own Bylaws. The Bylaws allow the Executive Board to "[p]rovide for the employment and payment of attorneys," and "[o]n behalf of the Union, its officers, employees or members, to initiate, defend, compromise, settle, arbitrate or release or to pay the costs of any legal proceedings or actions of any nature if, in its judgment, it shall be necessary or desirable *to protect, preserve, or advance the interests of the organization*." Bylaws, Art. XVII, §§ 1(c) and (d). Under the bylaws, therefore, the relevant question is whether the hiring of Hernandez and the filing of the action served to "protect, preserve, or advance the interests" of the Union.

[8] The defendants are no doubt correct that an unmeritorious action filed solely to further the political interests of the union officials who cause its filing is not in the interests of the union. On the other hand, an action instituted to ensure that the union's secretary-treasurer is properly handling union funds is quite obviously one designed "to protect . . . the interests" of the union. Section 501 of the LMRDA, which requires all union officials to "hold [the union's] money or property solely for the benefit of the organization and its members," itself makes this clear. As we concluded above, the record demonstrates that there was a reasonable basis for the action against Gullo. The plaintiffs' actions, therefore, were appropriate under, if not mandated by, § 501(b) and were in the interests of the union.

[9] It is irrelevant that the plaintiffs referred to the lawsuit against Gullo in the subsequent union election campaign or

that they may have benefitted politically from it. It is also irrelevant that the plaintiffs may have been motivated, in whole or in part, by political considerations when they brought the action. When an action is brought to recover unlawfully expended union funds or to obtain a statutorily required accounting, a reasonable basis for the action is sufficient, under the LMRDA, to preclude discipline.

[10] While the district court based its jury instructions, at least in part, on the erroneous mixed-motives theory, it is clear that the jury was presented with and resolved the question that properly controls the outcome of this case: whether the plaintiffs had valid reason to cause the hiring of Hernandez and the institution of the action against Gullo.[12] The district judge first instructed the jury that if the plaintiffs sued Gullo "to safeguard the union's assets and property," then the plaintiffs' actions were protected. The judge then instructed the jury that "if you find by a preponderance of the evidence that there was a reasonable standard for the discipline of plaintiffs under the circumstances of this case, your verdict must be for defendants." The judge instructed that the plaintiffs could legitimately be disciplined if they violated the union rule "which restricts candidates for office from using Union funds . . . in support of their candidacy." That is, under the instructions actually given by the district court, in order to find for the plaintiffs the jury was required to determine that they were engaged in protected conduct, i.e., that they hired Hernandez and instituted the action against Gullo in order to safeguard union assets. On the other hand, the jury was to find for the defendants if it determined that the plaintiffs used

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[12]An error in civil jury instructions does not require reversal if the error was more probably than not harmless. *See, e.g., Mockler v. Multnomah Cty,* 140 F.3d 808, 812 (9th Cir. 1998). In *Westinghouse Elec. Corp. v. General Circuit Breaker & Supply, Inc.,* 106 F.3d 894, 902 (9th Cir. 1997), we explained that an instructional error is harmless where the verdict demonstrates that, despite the error, the jury necessarily found all elements legally necessary to support the verdict. *See also Benigni v. City of Hemet,* 879 F.2d 473, 480 (9th Cir. 1989).

union funds to hire Hernandez and pursue the action "in support of their candidacy" for union office. While the plaintiffs might indeed have been entitled to an even more favorable instruction than was given (i.e. that regardless of the plaintiff's actual motives, a verdict should be returned in their favor if they had a legitimate basis for their actions, or ironically, if *their* motives were mixed) that error does not help the defendants.[13] In returning a verdict in favor of the plaintiffs, the jury necessarily concluded that the hiring of Hernandez and the institution of the action were undertaken in the interests of the union and not "in support of [the plaintiffs'] candidacy" for union office.

[11] Under the instructions given, the jury's verdict reflects the critical determination that the plaintiffs' hiring of Hernandez and institution of the action against Gullo was undertaken in order to safeguard union assets. This is an appropriate determination under the proper theory of the case. The plaintiffs are entitled, therefore, to reinstatement of the original jury verdict.[14]

[12] The defendants also contend that the damages are excessive and warrant a new trial, and raise two specific issues in this regard: (1) an alleged error in the calculation of Sandoval's lost wages, and (2) excessiveness of the damages for the § 101(a)(5) (the procedural rights) violation. Because of the long and tortured history of both the factual and legal events in this internal union dispute, and the fact that this action for damages was filed a decade ago, we will be more

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[13]As we note above, the district court also instructed the jury that it had to find for the defendants if the *defendants* satisfied the "mixed-motives" affirmative defense. While the court relied on an erroneous legal theory in giving this instruction, the availability of such a defense, of course, could only have helped the defendants. The presence of this erroneous instruction does not, therefore, alter our conclusion that the verdict for the plaintiffs should be reinstated.

[14]Accordingly, we need not reach the appellants' claims regarding the second trial.

specific with respect to our directions regarding damages than we might otherwise be. We first conclude that while a remittitur may be appropriate, no new trial is necessary. Where an award of damages is "grossly excessive or monstrous, clearly not supported by the evidence, or only based on speculation or guesswork," *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 791 F.2d 1356, 1360 (9th Cir. 1986), and gives rise to an inference that "passion and prejudice" tainted the jury's finding of liability, a new trial may be in order. *See, e.g. Seymour v. Summa Vista Cinema, Inc.,* 809 F.2d 1385, 1387 (9th Cir. 1987). As we have made clear, however, "[w]here there is no evidence that passion and prejudice affected the liability finding, remittitur is an appropriate method of reducing an excessive verdict." *Seymour,* 809 F.2d at 1387. While there is some evidence that the jury miscalculated the stipend to which Sandoval was entitled, and while the defendants' arguments regarding the excessiveness of damages as to the due process claim may have some colorable merit, there is no evidence that the liability determination was in any way tainted by passion or prejudice. On remand, therefore, the district court may consider a remittitur of damages, but may not order a new trial.

In remitting damages, the court may adhere to the format it applied with respect to Haas, but not necessarily the monetary diminutions at which it arrived. In Haas's case, the court remitted the § 101(a)(5) damages to $1000, the punitive damages against the union to $25,000, and the punitive damages against the individual defendants to $500 per defendant. The court left unaffected the damages for lost wages and injury to reputation. Although the remittitur awarded with respect to Haas may have been appropriate in light of the assumptions on which it was based, we would point out that those assumptions are no longer valid. The district court assumed, for example, that there was no merit to Haas's underlying claims of unlawful discipline. It also assumed that Haas was less culpable than the other plaintiffs because he had not signed the employment contract with Hernandez. On remand, the district

court must consider any remittitur in light of our holding that the plaintiffs' underlying claims of wrongful discipline were valid, and that indeed they were all disciplined unlawfully. Our holding also, of course, serves to eliminate any consideration of disparate culpability. Thus, the district court should treat the remittitur in Haas's case as a floor not a ceiling. Indeed, it would be well within its discretion to permit the plaintiffs to receive substantially higher damages than those allowed to stand in Haas's case.

We add a few caveats. Because defendants have preserved the claim of error on appeal, the district court may consider any contention regarding the amount of Sandoval's lost wages and reduce the award in his case to account for any erroneous calculation in that regard. As to punitive damages, the defendants did not specifically object to that part of the damages award on appeal, although they alluded to the subject in the heading of a sub-section of their brief. Given all the circumstances, we conclude that the district court retains its jurisdiction to issue an appropriate remittitur with respect to punitive damages in the case of the individual defendants, but that with respect to the union it should exercise that discretion only if it is strongly persuaded that such action is required in the interests of justice. In accordance with our holding, the district court may also remit a reasonable portion of the § 101(a)(5) damages award should it deem such a remittitur appropriate, but it may not remit any part of the damages award for lost wages (other than as a result of any erroneous calculation affecting Sandoval) or for injury to reputation. Because the Haas damages verdict did not contain any emotional distress award and thus the district court was not called on to consider its appropriateness, we leave to the district judge's discretion the question whether the award to Brooke of such damages is subject to remittitur, although we note that defendants did not consider that part of the award so excessive as to be worthy of mention in its brief. Interest on the damages ultimately awarded by the district court shall be paid from the date of the original judgment, October 18, 1994. *See, e.g., American*

Telephone & Telegraph Co. v. United Computer Systems, Inc., 98 F.3d 1206, 1209 (9th Cir. 1996)(*citing Northrup Corp. v. Triad Int'l Marketing, S.A.*, 842 F.2d 1154, 1156 (9th Cir. 1988)). That judgment was legally sufficient to allow adequate "ascertainment of the damage[s]," subject, of course, to the remittitur ordered herein. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

III.

The Cross Appeal

We finally consider the defendants' argument that the district court erred in granting summary judgment on the plaintiffs' § 101(a)(5) due process claim. The defendants do not dispute the district court's finding that the first hearing, the hearing before the Local 287 board, was "clearly biased given that plaintiffs' political opponents actively participated." *Hass v. Local 287*, 832 F. Supp. 283, 287 (N.D. Cal. 1993). Rather, they dispute the district court's holding that the second hearing, before the Teamsters Joint Council, was biased as a matter of law and that it therefore did not cure the procedural deficiencies of the first hearing.

[13] A trial de novo is required to remedy a union disciplinary hearing that does not meet the due process standards of § 101(a)(5). *See Myers v. Affiliated Property Craftsmen*, 667 F.2d 817, 820 (9th Cir. 1982). Although a full trial de novo that results in an independent determination of the merits of the case can cure the procedural defects of a biased local union hearing, *see, e.g., Perry v. Milk Drivers & Dairy Employees Union, Local 302*, 656 F.2d 536, 539 (9th Cir. 1981), a mere review of the evidence or results of the previous hearing, is not sufficient to constitute such a trial. Here, the evidence presented to the Joint Council consisted almost entirely of the transcript of the first hearing (conducted before the biased Local 287 panel). A lengthy statement made at that hearing by Mario Gullo was introduced, but that hardly serves

to cure the defects of the first trial. The plaintiffs did not testify themselves, nor did they put on witnesses, and while the Joint Council did formally give the plaintiffs an opportunity to present evidence, it is clear from the record that the plaintiffs were not afforded adequate notice of that opportunity.[15] In short, the Joint Council appears to have relied primarily on the transcript of the local union hearing, and accordingly the second hearing did not constitute a trial de novo. Under these circumstances, the second proceeding fails to cure the procedural defects committed at the first.[16] We therefore affirm the district court's grant of summary judgment as to plaintiffs' § 101(a)(5) claim.[17]

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[15]Because of the lack of notice, the formal opportunity to testify afforded the plaintiffs does not render the Joint Council hearing a trial de novo. We do not, therefore, determine whether the Joint Council proceedings would have cured the procedural defects in the first hearing had the plaintiffs genuinely been afforded a full opportunity to testify.

[16]The defendants argue that the Declaration of Chuck Mack demonstrates that the Joint Council "conducted a full retrial of the charges . . . ; that the charged parties presented witnesses, and had an opportunity to cross-examine the charging parties' witnesses; that documentary evidence was presented; and that the Joint Council's decision was based upon its own consideration of the evidence presented." This contention is misleading at best. The portion of Chuck Mack's declaration, to which the defendants refer, deals with the second hearing of David Haas. The plaintiffs had a *separate* second hearing before the Joint Council. Mack's declaration makes this perfectly clear, and the transcripts of the two separate proceedings are contained in the record. Although Mack's declaration regarding the Haas hearings does state that "[t]he Joint Council conducted a full retrial of the charges made against Mr. Haas," such a statement is conspicuously absent from Mack's declaration regarding the plaintiffs' second hearing. Mack's declaration with regard to *plaintiffs'* second hearing also does *not* indicate that the "charged parties presented witnesses." It lends no support to the defendants' claim.

[17]We note that our decision finds support in the holdings of other circuits. In *Catlett v. Local 7370*, 69 F.3d 254 (8th Cir. 1995), for example, after the plaintiffs were disciplined by their local union, they appealed to the union International. The Eighth Circuit reiterated the rule that only a genuine trial de novo can cure procedural defects that occur at a union disciplinary hearing. *See id.* at 259. The court then held that because the

IV.

Conclusion

The district court's new trial order entered following the first trial is **REVERSED**. We **REMAND** to the district court for vacatur of the judgment following the jury's verdict in the second trial, for reinstatement of the jury's verdict in the first trial and entry of judgment in favor of the plaintiffs, and for consideration of a possible remittitur of damages. The district court's grant of summary judgment on the § 101(a)(5) claim is **AFFIRMED**.

REVERSED AND REMANDED IN PART, AFFIRMED IN PART.

International hearing panel relied on evidence presented at the earlier hearing, and because no oral testimony was taken at the hearing conducted by the union International, the second procedure did not constitute a trial de novo sufficient to cure the § 101(a)(5) defects of the first hearing. *See id.*

Likewise, in *Goodman v. Laborers International Union*, 742 F.2d 780, 785 (3rd Cir. 1984), the Third Circuit held that a second union disciplinary hearing did not constitute a trial de novo. The court concluded that incorporation of the record of the local union hearing into the evidence considered by the second panel was "improper" and undermined the "independence and objectivity" of the second hearing. *See id.* at 785. Despite the fact that the panel in the second hearing permitted the disciplined union member to put on a defense, the court found that the second proceeding could not cure any defects in the original local union hearing. *See id.*

APPENDIX B — MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED DECEMBER 20, 1994 AND FILED DECEMBER 29, 1994

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C 89-20531 WAI

DAVE HAAS, BILL BROOKE, ROBERT SANDOVAL, AND ROBERT WILLIAMS,

Plaintiffs,

vs.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287, ED QUINTAL, ED DE BROCK, GEORGE NETTO, and LEE SCOGGINS

Defendants.

MEMORANDUM OF DECISION

Defendants' Motion for Judgment as a Matter of Law pursuant to the provisions of Federal Rule of Civil Procedure 50 is DENIED as to all plaintiffs and all defendants.

Defendants' Motion for New Trial is GRANTED as to all issues with respect to Plaintiffs Brooke, Williams and Sandoval. In this Court's view, the great weight of the evidence favors Defendants' affirmative defense that those

plaintiffs would have been disciplined in any event for violating a reasonable rule of the Union even if the Defendants disciplined them because of a retaliatory motivation. Plaintiffs Brooke, Williams and Sandoval admitted that they executed, on behalf of the Union, the retainer agreement with Attorney Hernandez. Hernandez testified that thereafter, and pursuant to his retainer, he performed services which appear directly related to the then-pending 1988 election campaign, the results of which were publicized in that campaign. Exs. G, H, I, J, K. No evidence significantly contradicts this conduct, and a new trial on issues of liability based on Defendants' alleged retaliation for Plaintiffs' exercise of rights specified in 29 U.S.C. §§ 411(a)(2) and 411(a)(4) is required.

The weight of the evidence with respect to the force of the affirmative defense is less compelling with respect to Plaintiff Haas, because he was not a signatory to the Hernandez retention agreement, and, while he was present for part of the initial meeting with Hernandez, he was excluded therefrom during the actual retention of Hernandez' legal services. Testimony of Haas. While there is circumstantial evidence which suggests that Haas was a beneficiary of the allegedly partisan efforts of Hernandez, it is not of the compelling weight necessary to justify the granting of a new trial in Plaintiff Haas' case.

The punitive damages assessed against the Defendants in favor of Haas are disproportionate to the Defendants' ability to respond, having regard to the extent of assets of each of the defendants.

Appendix B

The damages assessed in favor of Haas for violation of Section 101(a)(5) are without foundation in the evidence if construed as compensatory damages, and grossly disproportionate to the ability of the Defendants to respond if construed in whole or in part as exemplary damages.

The evidence does not, in the Court's view, require the granting of a new trial on the issue of Haas' alleged failure to mitigate damages.

Accordingly, the Court will deny the Motion for New Trial with respect to Plaintiff Haas, if Haas agrees to remit all sums over $1,000.00 with respect to the Section 101(a)(5) damages and all sums in excess of $25,000.00 assessed against Defendant Union as exemplary damages and all sums over $500.00 assessed as exemplary damages against Defendants Quintal, Netto, Scoggins, and De Brock.

Plaintiff's Motion for Attorneys Fees is denied without prejudice pending final resolution of the case. If counsel wishes to pursue the motion for fees incident to the representation of Plaintiff Haas, and if Mr. Haas agrees to the remittitur of damages above referred to, counsel may so move at his convenience.

DATED: 12 20 94

s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IT IN PART AND DENYING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT DATED AND FILED SEPTEMBER 27, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C 89-20531 WAI

DAVE HAAS; BILL BROOKE; ROBERT SANDOVAL; and ROBERT WILLIAMS,

Plaintiff,

vs.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287; ED QUINTAL, ED DE BROCK; GEORGE NETTO; and LEE SCOGGINS,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IT IN PART AND DENYING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion for partial summary judgment and defendants cross motion for summary judgment came on

regularly for hearing on August 12, 1993, before the Honorable Robert P. Aguilar. All parties appeared represented by counsel. Based on the pleadings, the submitted declarations and evidence, oral argument, the court records and good cause appearing therefor, the court GRANTS plaintiffs' motion in part and DENIES plaintiffs motion in part. The court DENIES defendants' cross motion for summary judgment.

I

FACTUAL BACKGROUND

This case arises out of a union dispute. During their membership in the International Brotherhood of Teamsters Local 287 Union ("Local 287"), plaintiffs became dissatisfied with the performance of the secretary-treasurer, Mario Gullo, and requested an accounting.

In order to investigate Gullo's conduct, the Executive Board, then comprised of plaintiffs Bill Brooke, Robert Sandoval, Robert Williams, and non-plaintiff Barton Wolin, adopted a resolution authorizing investigation of supplemental dues and related matters by attorney Fernando Hernandez.

Hernandez started an investigation of Local 287 for its charging of supplemental dues and instituted a lawsuit for an accounting of union finances against Gullo, the then secretary-treasurer.

Before the lawsuit had significantly advanced, an election was held and a reversal of power occurred within

the Executive Board. New union officers were elected. Plaintiff Haas defeated Gullo, and Haas became the new secretary-treasurer. Gullo's supporters (Quintal, De Brock, Netto and Scoggins), however, were elected to a majority of the Executive Board. Shortly thereafter, Gullo filed a protest with the new Executive Board. He claimed that the plaintiffs hired the attorney to investigate his handling of the union's finances simply to gain votes for Haas, the alternate candidate for secretary-treasurer.

On March 2, 1989, the union Joint Council convened to hear Gullo's election protest. The Joint Council set aside the election after finding several irregularities. The decision was appealed to the General Executive Board. The Executive Board, in turn, affirmed the Joint Council's decision.

Shortly after the re-run election, attorney Hernandez was discharged by the newly structured Executive Board.

A. *First Union Trial of Plaintiffs on Gullo's Charges*

A hearing on the internal charges filed by defendant Gullo was scheduled for August 16, 1989. On August 15, 1989, plaintiff Haas, who had power to cancel the hearing under the bylaws of the union, canceled the trial hearing. None of the plaintiffs attended the hearing because they assumed it to be canceled. Nonetheless, plaintiffs were tried and convicted in absentia.

Four of plaintiffs' political opponents, the defendants, sat as judges in this hearing. Plaintiffs were convicted.

Appendix C

As a result of their convictions, plaintiffs were removed from office, fined $5,000.00 and ordered to reimburse the union for the attorneys' fees accrued by Hernandez. Plaintiffs filed an application for a stay of discipline pending appeal with the International Board of Teamsters ("IBT") General President. The stay was granted. Plaintiffs were restored to office.

A re-run election to clean up the alleged campaign irregularities (*i.e.*, the hiring of attorney Hernandez to investigate Gullo) was held. Plaintiffs were defeated. Gullo was restored to his secretary-treasurer role.

Plaintiffs filed timely protest over the results of the re-run election with the Joint Council. Plaintiffs alleged that the convictions on Gullo's charges and their resulting brief removal from office were improperly used by Gullo, Quintal, De Brock, Netto and Scoggins in the re-run election campaign.

The Joint Council determined that the revelation of the plaintiffs' brief removal from office was not prejudicial to the result of the re-run election. The Joint Council upheld the election results. This finding was affirmed by the IBT Executive Board and the Secretary of Labor.

B. *Appeal of Convictions*

Plaintiffs then appealed their convictions on Gullo's charges to the Joint Council. The appeal was heard by the same Joint Council that had previously determined the first election invalid due to campaign irregularities related to the

hiring of attorney Hernandez. The appeal was supposed to be a de novo trial on the charges so as to cure any bias which may have been present in the first trial.

The Joint council reversed plaintiff Haas' conviction, but it affirmed the convictions of plaintiffs Brooke, Williams and Sandoval.

Plaintiffs then instituted this action alleging that defendants violated their union rights to free speech and assembly; their union right to initiate lawsuits; and their due process rights respecting union disciplinary actions.

II

DISCUSSION

A. *Standard of Review*

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if no factual issues exist for trial. To survive a motion for summary judgment, the non-moving party must demonstrate that the fact in contention is material, *i.e.*, a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 10 S. Ct. 2505, 2510 (1986). In addition, the non-moving party must demonstrate that the factual dispute is genuine, *i.e.*, the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

Appendix C

B. *Defendants' Cross Motion for Summary Judgment*

Can Plaintiffs recover damages caused by their defeat in the 1989 re-run election?

The legal issue to address in determining whether plaintiffs are entitled to recover damages, in this court, caused by their defeat in the 1989 re-run election is whether Title IV of the Labor Management Reporting and Disclosure Act ("LMRDA") deprives this court of jurisdiction. According to Title IV, this court has no jurisdiction over a private action which challenges the validity of an election. Such actions are governed by Title IV of LMRDA. Plaintiffs' exclusive remedy is to file a complaint with the Secretary of Labor. *Furniture Moving & Piano Drivers Local 82 v. Crowley*, 467 U.S. 526 (1984).

The *Crowley* case recognizes an exception to this exclusivity provision. Title IV may not bar post-election relief for Title I claims or other actions that do not directly challenge the validity of an election already conducted. *Id.* at 541.

Title I, 29 U.S.C. §§ 411-415, provides a bill of rights for union members. It guarantees equal rights and privileges to nominate and vote for candidates, as well as freedom of speech and assembly, and protection from improper discipline. Title I is enforceable in federal court through a private action filed by the aggrieved union members.

In contrast, Title IV, 29 U.S.C. §§ 481-483, sets detailed regulations aimed solely at protecting union democracy

through free and democratic elections. *Molina v. Union De Trabajadores De Muelles*, 762 F.2d 166, 167 (1st Cir. 1985), citing *Crowley, supra*.

In this case, plaintiffs are not seeking to set aside the re-run election rather they are seeking compensatory relief for torts related to the election. See *Kupau v. Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980); *Ross v. International Brotherhood of Electrical Workers*, 544 F.2d 1022, 1025 (9th Cir. 1976).

In *Kupau*, the court adopted a test to distinguish between Title I and Title IV remedies. "The crucial inquiry is whether a union member has been discriminated against in the exercise of his Title I rights. If so, 'then regardless of the other claims' his Title I cause of action is not preempted by the existence of Title IV claims." *Kupau*, at 455, citing *Depew v. Edmiston*, 386 F.2d 710, 712 (3rd Cir. 1967).

Plaintiffs are seeking monetary damages for violations of their rights under LMRDA and for wrongs that occurred prior to, during, and subsequent to the election and its campaign. Plaintiffs' complaint includes claims for financial injury, such as the fines imposed on them or lost wages which resulted from the LMRDA violations. They also seek damages for emotional distress and injury to their reputation. It is a question for the jury as to whether or not plaintiffs should recover compensatory damages for violation of Title I. *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1305-06 (9th Cir. 1979); *Christopher v. Safeway Stores, Inc.*, 476 F. Supp. 950, 955 (S.D. Tex. 1979), aff'd 644 F.2d 467 (5th Cir. 1981), and *Ross v. International*

Brotherhood of Electrical Workers, 513 F.2d 840, 842-43 (9th Cir. 1975).

This court holds that defendants' cross-motion for summary judgment on the grounds of no jurisdiction is denied. The court properly has jurisdiction over the matters at hand, and there are genuine issues of material fact to be litigated at trial.

C. *Plaintiffs Motion for Partial Summary Judgment*

1. Did defendants violate plaintiffs' right of due process in union disciplinary proceedings?

Under Section 101(a)(5) of LMRDA, a union member may not be disciplined unless (a) served with written specific charges; (b) given a reasonable time to prepare his defense; and (c) afforded a full and fair hearing. The charges must be specific enough to inform the accused member of the offense that he has allegedly committed. He must be given a reasonable period of time to prepare his defense once he knows the nature of the accusations against him. *International Brotherhood of Boilermakers v. Hardean*, 401 U.S. 233 (1971).

Plaintiffs allege that no fair and impartial hearing was conducted at either the initial hearing or the second trial de novo. A fair hearing is one before a neutral and disinterested body that has not pre-judged the case. One biased member may be sufficient to taint a hearing. *Myers v. Affiliated Property Craftsmen, etc.*, 667 F.2d 817, 820 (9th Cir. 1982).

Appendix C

The first trial was clearly biased given that plaintiffs' political opponents actively participated. According to *Goodman v. Laborers' Intern. Union of North America*, 742 F.2d 780, 783 (3rd Cir. 1984), the court reasoned that failure to attend a trial hearing and to raise the issue of bias of the trial board does not preclude a plaintiff from raising the issue in a court proceeding under LMRDA. *Goodman*, citing *Falcone v. Dantinne*, 420 F.2d 1157, 1161-62 (3rd Cir. 1969). In that case, it was held that it was the responsibility of the defendants to disqualify themselves for bias whether or not plaintiff had actually attended the hearing.

This court finds that the second trial de novo was biased as a matter of law. Plaintiffs allege that the Joint Council ("JC") trial de novo did not cure procedural defects in the first trial because: 1) the JC was biased in that it had previously reviewed the election and made the determination that the initial election was faulty due to campaign irregularities; 2) in the de novo hearing, the JC relied on evidence from the previously tainted hearing; 3) plaintiffs were not apprised of the charges against them and were convicted on entirely different charges than those set out in the written complaint; and 4) plaintiffs were not apprised that the hearing was to be a de novo hearing.

A trial de novo must be fair and impartial as any other trial under Section 101(a)(5) of LMRDA. *Goodman*, *supra* at 785. Use of records from a prior tainted proceeding in a later hearing can taint the hearing. *Goodman* at 785; see also *Tincher v. Piasecki*, 520 F. 2d 851 (7th Cir. 1975). In *Tincher*, the court invalidated a union disciplinary proceeding. This was done because the tribunal had considered a report, which

it had prepared after convicting the accused at a prior trial, the result of which had been set aside because the accused had received inadequate notice of the charges against him. Although there is no per se rule which would preclude use of information from a previous tainted trial, the *Tincher* case indicates that use of such information would be subject to strict scrutiny. *Rosario v. Amalgamated Ladies Garment Cutters Union Local 10 Etc.*, 605 F.2d 1228, 1244 (2nd Cir. 1979).

Based on a combination of the fact that plaintiffs' political opponents served as the trial judges and the use of tainted evidence, this court rules that the first and second trials denied plaintiffs the due process guaranteed them under the LMRDA.

2. Did defendants violate Section 101(a)(4) of LMRDA by disciplining plaintiffs Brooke, Williams and Sandoval because they instituted a lawsuit against Mario Gullo?

This court holds that summary judgment should not be granted on this issue, as questions of material fact remain to be decided by the jury. It has not yet been determined whether or not plaintiffs were disciplined because they initiated the lawsuit or because they went beyond the boundaries of the Executive Board's resolution in investigating Gullo. If the discipline stemmed from misuse of the attorney's time, it would not be related to individual rights but proper union management and use of union finances.

Section 101(a)(4) of the LMRDA expressly protects the right of union members to institute lawsuits:

Appendix C

"No labor organization shall limit the right of any member thereof to institute an action in any court. . . ."

In contrast to the above, however, defendants are claiming that plaintiffs were not disciplined for violation of this section but for misusing union moneys. They claim plaintiffs actions breached their fiduciary duties in fostering their campaign objections.

Given that there appears to be a continuing question of fact on the purpose of the discipline, the case is not ripe for summary judgment at this time on this issue.

IV

CONCLUSION

For the reasons stated above this court hereby DENIES defendants' cross motion for summary judgment on the jurisdictional issue, GRANTS plaintiffs' motion for summary judgment on the due process issue and DENIES plaintiffs' motion for summary judgment on the 101(a)(4) claim.

IT IS SO ORDERED.

DATED: September 27, 1993

s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 7, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-15267
96-15274

DC# CV-89-20531-WAI

SANDY SNYDER, ADMINISTRATOR
OF THE ESTATE OF DAVID HAAS,

Plaintiff,

and

BILL BROOKE; ROBERT SANDOVAL;
and ROBERT WILLIAMS,

Plaintiffs-Appellants-
Cross-Appellees

v.

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL NO. 287; ED QUINTAL; ED DE BROCK; GEORGE NETTO; and LEE SCOGGINS,

Defendants-Appellees-
Cross-Appellants.

Appendix D

ORDER

Before: REINHARDT, NOONAN, and THOMPSON, Circuit Judges:

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Thompson have voted to reject the suggestion for rehearing en banc and Judge Noonan so recommends.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX E — RELEVANT STATUTES

29 U.S.C. § 411(a)(2), (a)(4) and (a)(5)

§411. Bill of rights: constitution and bylaws of labor organizations

(a)(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

(a)(4) Protection of the right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respōndents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but

not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

* * *

(a)(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

* * *

29 U.S.C. § 481(g)

(g) Use of dues, assessments or similar levies, and funds of employer for promotion of candidacy of person

No moneys received by any labor organization by way of dies, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in any election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

* * * *

APPENDIX F — JURY INSTRUCTION RE LIABILITY

In order to establish their claim that they were disciplined in retaliation for their exercise of rights protected by the LMRDA, each plaintiff must first make an initial showing that he was disciplined under circumstances which give rise to an inference of retaliation.

This requires each plaintiff initially to prove each of the following propositions:

One, that the conduct he engaged in was protected by the LMRDA.

Two, the defendants' decision to discipline plaintiff was made in significant part because of his exercise of these protected rights.

And, three, that he suffered an injury as a proximate result of the disciplines taken by defendants.

If you find that plaintiffs have failed to prove by a preponderance of the evidence any one of those elements, your verdict must be for the defendants.

I have just instructed you regarding plaintiffs' burden of proof and the elements which are necessary to make out a "prima facie" case of retaliatory discipline. I will now instruct you on the defendants' burden of proof with respect to an affirmative defense.

If you find that plaintiffs have established each of the elements necessary to make out a prima facie case of

retaliation for their exercise of legally protected rights, then defendants may rebut that inference by proving by a preponderance of the evidence that the plaintiffs would have been disciplined for violating a reasonable rule of the Union even if defendants had not been motivated by an improper purpose. And that's for the defense to prove.

Therefore, if you find by a preponderance of the evidence that there was reasonable standard for the discipline of plaintiffs under the circumstances of this case, your verdict must be for the defendants. You must keep in mind that the ultimate burden of proving their claim always is upon plaintiffs.